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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/701,057	11/22/2000	Henning Von Spreckelsen	44257.830001	7735

7590 09/02/2003

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EXAMINER

NEWHOUSE, NATHAN JEFFREY

ART UNIT PAPER NUMBER

3727

DATE MAILED: 09/02/2003

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 15

Application Number: 09/701,057

MAILED

Filing Date: November 22, 2000

SEP 2 2003

Appellant(s): VON SPRECKELSEN ET AL.

GROUP 3700

Francis A. Sirr
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 18, 2003.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 12-16 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *ClaimsAppealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

4,815,618	GACH	3-1989
6,117,506	GRABOSKI et al.	9-2000

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6,082,568	FLANAGAN	7-2000
6,076,334	KITAHORA et al.	6-2000
4,141,680	KAUFFMAN et al.	2-1979

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Gach

'618 in view of Graboski et al. '506. Gach teaches a molded bottle 10, a cap and neck assembly 18 and a foil 56 located between them. The cap and neck assembly is heat sealed to the bottleneck 14 after the bottle has been filled. See col. 3, lines 28-47.

Method of forming cap and neck assembly
Gach does not teach the bottle being made by extrusion blow molding to form a thin walled bottle and being non-gas tight. Graboski et al. teaches a bottle that is made by extrusion blow molding. See column 2, lines 59-64. The resulting bottle has a thickness of 0.381mm(0.015 in.) to 2.159mm(0.085 in.) and can be made of high-density polyethylene, which is the same material as applicant's invention and is non-gas tight. It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the bottle of Gach by extrusion blow molding to form a "thin walled" bottle made of high density polyethylene as taught by Graboski et al. to provide a bottle which protects its contents from degradation from light.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Gach '618 in view of Graboski et al. '506, as applied to claim 11 above, and further in view of Flanagan '568. Gach, as modified above, does not teach the method of forming the method of forming the cap and neck assembly by injection molding. Flanagan teaches

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a similar cap and neck assembly to what is taught by Gach. Flanagan further teaches that this cap and neck assembly is made by injection molding. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to make the cap and neck assembly of Gach by injection molding as taught by Flanagan, as this is a well known method of making caps.

Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Gach '618 in view of Graboski et al. '506 and Flanagan '568 as applied to claim 12 above, and further in view of Kitahora et al '334. Gach, as modified above, teaches everything except for the foil being sterilized before applying to the bottle. Kitahora et al. teaches a method of forming and closing a bottle. A perform is extrusion blow molded to form a bottle, the bottle is then filled, and the bottle is closed by a cap assembly with the cap assembly being sterilized prior to applying. It would have been obvious to one of ordinary skill in the art at the time the invention was made to sterilize the cap and neck assembly of Gach as taught by Kitahora et al., prior to applying the cap and neck assembly to the bottle, to remove any dirt, etc. from the cap to prevent contamination of the product in the bottle.

Claims 14-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gach '618 in view of Graboski et al. '506 and Flanagan '568 as applied to claim 12 above, and further in view of Kauffman et al. '680. Gach, as modified above, teaches the bottle being made by extrusion blow molding, but does not teach the bottle being formed by rotary machine. Kauffman et al. teaches bottles that are formed by a rotary extrusion blow molding method and apparatus. It would have been obvious to one of

ordinary skill in the art at the time the invention was made to make the bottle of Gach by a rotary extrusion blow molding as taught by Kauffman et al. as this is a well known method extrusion blow molding of bottles.

(11) Response to Argument

With respect to appellant's argument that appellant's invention solves a long felt need of mating a resealable injection-molded cap to an extrusion-blow-molded thin-walled bottle, appellant submits exhibits A-F to support this assertion. The exhibits (A-F) are articles which generally state that appellant's closure is "revolutionary" and previous closures leaked. First, appellant has not met the burden of establishing a long felt need. See MPEP 716.04. Appellant has not shown that an art recognized problem existed in the art for a long period of time without solution. *In re Gershon*, 372 F.2d 535, 539, 152 USPQ 602, 605 (CCPA 1967). There is no support within these articles that a long felt need existed or that others in the art unsuccessfully attempted to solve the problem. Second, appellant has not shown that the long felt need must not have been satisfied by another before the invention by applicant. *Newell Companies V. Kenney Mfg. Co.*, 864 F.2d 757, 768, 9 USPQ2d 1417, 1426 (Fed. Cir. 1988). The mere fact that prior milk containers leaked does not support the requirement that others in the art unsuccessfully attempted to solve this problem. Appellant's invention solved the "mismatch" between the injection molded cap and the extrusion blow molded bottle which caused the leak known in the milk bottle industry. However, the U.S. Patent 4,722,448 to Nolan teaches an injection molded cap used to seal a blow molded milk

bottle as the cap is attached to the bottle via a foil seal that causes the cap to be heat sealed to the bottle.

With respect to appellant's exhibits G and H, the fact that appellant's invention was patented in Great Britain and Australia has no bearing on the patentability of appellant's invention in the United States.

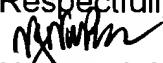
In response to appellant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the motivation to combine these references was set forth in the rejections. See section 10 of the examiner's answer.

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Clearly, Gach teaches a resealable neck and cap assembly that is applied to a

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plastic bottle. Gach teaches the use of a foil seal to ensure that no leakage occurs between the cap and neck assembly and the plastic bottle. Graboski et al. teaches a well known method of making an extrusion blow molded bottle. Flanagan teaches a well known method of making an injection molded cap and neck assembly. Using these well known methods to form the plastic bottle and cap and neck assembly of Gach is within the general knowledge of one of ordinary skill in the art.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Nathan J. Newhouse
Primary Examiner
Art Unit 3727

September 2, 2003

Conferees


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